No. 80-1388

MAR 24 1981

ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD D. DOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to enforce a plea offer.

2. Whether the district court abused its discretion by reviewing certain materials *in camera*.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. A petition for rehearing was denied on December 19, 1980 (Pet. App. 15a). The petition for a writ of certiorari was filed on February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a bench trial in the United States District Court for the District of Columbia, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a); possessing marijuana, in violation of D.C. Code Ann. § 33-402 (1973); and possessing hashish, in violation of D.C. Code Ann. § 33-402.

Petitioner was sentenced to three years' imprisonment and a special parole term of three years for the conviction on the cocaine charge, and received concurrent one-year terms of imprisonment on the marijuana and hashish counts. The court of appeals summarily affirmed (Pet. App. 6a-7a).

On September 28, 1978, officers of the D.C. Metropolitan Police Department executed a search warrant at petitioner's residence and discovered a plastic bag containing approximately four ounces of cocaine with an estimated street value of $10,000, a quantity of marijuana and hashish, and a .357 magnum pistol and ammunition. The officers also found cocaine in a rolled up ten-dollar bill in petitioner's coat pocket. Petitioner was arrested and charged with possessing the cocaine, marijuana and hashish in a four-count indictment filed on November 28, 1978.[1]

Petitioner moved for an order to dismiss the indictment or to require specific performance of an alleged plea agreement whereby petitioner would be permitted to plead guilty to a misdemeanor.[2] On February 23, 1979, a hearing was held on this motion. Howard L. Cushenberry, an Assistant United States Attorney, testified at the hearing that prior to the indictment petitioner's attorney asked him whether petitioner could be allowed to plead guilty to a misdemeanor. Cushenberry replied that "we could explore those options * * * if [petitioner] would work with the government and perhaps give us the name of his source" (I Tr. 8-9).[3] Petitioner's attorney said he would "get back" to Cushenberry.

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[1] In addition to the three counts on which petitioner was convicted, he was also charged with possessing cocaine, in violation of D.C. Code Ann. § 33-402.

[2] Apparently, petitioner no longer seeks dismissal of the indictment (see Pet. i, 9).

[3] "I Tr." refers to the transcript of the February 23, 1979 hearing.

When Cushenberry did not hear from petitioner's attorney, Cushenberry telephoned him shortly before an indictment had to be filed and asked him whether petitioner was willing to cooperate. Petitioner's attorney replied that he had not "made up his mind." Cushenberry told petitioner's counsel that he would seek an indictment and that he should pursue any further discussions with the trial attorney to be assigned to the case (*id.* at 9-16). Thereafter petitioner was indicted.

Assistant United States Attorney David S. Krakoff, who had post-indictment responsibility for petitioner's case, also testified at the February 1979 hearing. He stated that on December 4, 1978, petitioner's attorney asked him if petitioner could be permitted to plead guilty to a misdemeanor in exchange for the name of his supplier. Krakoff replied that he would discuss the matter with his superiors. After conferring with his superiors, Krakoff told petitioner's attorney that providing the name of petitioner's supplier would not be sufficient cooperation (1 Tr. 20-22). On December 27, 1978, Krakoff told petitioner's attorney that a misdemeanor plea would be accepted if: (1) petitioner made a controlled purchase of narcotics from his supplier or another similarly situated supplier in order for the police to obtain an arrest or search warrant, and (2) petitioner testified before the grand jury. Petitioner's attorney did not accept or reject the offer, but instead arranged a meeting with petitioner and Krakoff to discuss the offer (*id.* at 25-26).

Krakoff further testified that on January 2, 1979, a meeting was held among himself, Sergeant Gonzalez and Detective Centrella of the Metropolitan Police Department, petitioner and his attorney. At the outset of the meeting, Krakoff advised petitioner of his rights and stated "that in no way could anything that he said be used against him" (1 Tr. 30, 35). Krakoff repeated the offer, including the two conditions that he had previously discussed with petitioner's

attorney (*id.* at 27, 29-30, 33-34). After petitioner conferred with his attorney, he told Krakoff that he would give him the name of his supplier. Krakoff replied "in no uncertain terms that that was not enough" and that the two stated conditions were essential to an agreement (*id.* at 35). Petitioner told Krakoff that his supplier was "Ed Green" who lived in New York City, and indicated that he was willing to appear before the grand jury (*id.* at 28-31). However, petitioner repeatedly refused to agree to participate in a controlled buy from a narcotics supplier because he allegedly did not know anyone engaged in narcotics trafficking. Moreover, petitioner said that "he couldn't even provide information about his supplier because his supplier knew that he had been arrested" (*id.* at 29-30, 34, 36-37, 39-40). Petitioner also stated that his possession of the four ounces of cocaine at issue was the only time he was involved in drug dealings (*id.* at 74).

Krakoff also testified that at the end of the January 2 meeting an agreement had not been reached; petitioner had not accepted the offer and was unwilling or unable to provide the information and cooperation that the government had sought in exchange for a misdemeanor plea (1 Tr. 28, 32, 37-38, 39-40, 51-52). Consequently, Krakoff told petitioner that he had 30 days to decide whether he was willing to accept the offer and to provide the requested information and cooperation (*id.* at 37, 39-40, 51-52).

On January 5, 1979, Krakoff told petitioner's attorney that the government had withdrawn its offer (1 Tr. 47). Krakoff explained that he withdrew the offer because he received new information from law enforcement officials on January 4, 1979, indicating that, contrary to petitioner's representation at the January 2 meeting, petitioner was heavily involved in illicit drug trafficking. Hence Krakoff and his superiors did not believe that a misdemeanor disposition was in the interest of justice (*id.* at 48, 70-71, 74).

In addition, Detective Gonzalez testified at the hearing that no one named "Ed Green" lived at the address petitioner gave Krakoff. Gonzalez also confirmed that at the January 2 meeting petitioner said he was unable to arrange a buy of cocaine similar to the four ounces he possessed from a "bona fide dope dealer" because he did not know any suppliers other than "Ed Green" from New York. Petitioner had stated "I don't know anybody and I can't do anybody, just a one-shot deal from New York" (I Tr. 63-66).

2. Following the hearing on petitioner's motion, the district court made written findings of fact and conclusions of law based generally on the testimony of the government witnesses (Pet. App. 1a-5a). In particular, the district court found that plea negotiations were conducted at the January 2, 1979, meeting, which was adjourned with the understanding that petitioner would be allowed to plead guilty to a misdemeanor if within 30 days he (1) participated in a controlled buy of illicit narcotics in the Washington, D.C., area from someone who sold illicit drugs comparable to that of his alleged New York supplier, and (2) testified before the grand jury. The court also found that on January 4, 1979, the prosecutor learned from other law enforcement officials that, at the January 2 meeting, petitioner did not accurately characterize his involvement in the drug trade. The court further concluded that on January 5, 1979, the prosecutor told petitioner's counsel that the plea offer made on January 2 was revoked, and that petitioner had not undertaken any action in performing the two pre-conditions to a plea agreement before the offer had been revoked.

Based on these and other factual findings, the district court held (Pet. App. 4a-5a) that petitioner had done nothing to perform the two pre-conditions under the offer and had not acted to his detriment in reliance on the plea offer. Hence,

the district court denied petitioner's requests for either specific performance of the offer or dismissal of the indictment. The district court also concluded that the discovery of information not known by the prosecutor when he extended the plea offer, which indicated that petitioner's representations at the January 2 plea negotiations were not entirely truthful, constituted an extenuating circumstance justifying revocation of the offer.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that he "unequivocally accepted" the prosecutor's offer to plead guilty to a misdemeanor charge and relied on the plea agreement to his detriment by naming the source of his drugs and by waiving his Fifth Amendment privilege against compulsory self-incrimination and making incriminating statements during the January 2, 1979, meeting. Consequently, petitioner argues that the district court should be directed to order the government to abide by its original plea offer and that he is entitled to plead guilty to a misdemeanor. Petitioner's contentions are factually and legally erroneous.

At the outset, we note that petitioner did not detrimentally rely on the plea offer extended at the January 2 meeting. First, petitioner was advised at the meeting that whatever he said could not be used against him (see Fed. R. Crim. P. 11(e)(6)), and, indeed, his statements were not used against him at trial. Therefore, petitioner, who was not compelled to make any statements, did not in any event make statements that effectively incriminated himself; accordingly, he did not waive his Fifth Amendment privilege to his detriment. Moreover, petitioner did not name his source as a product of, or in reliance upon, a consummated plea agreement. Rather, petitioner "named" his drug supplier in the course of preliminary negotiations in an effort to obtain a plea agreement. As the district court found, the

January 2 plea discussion meeting ended with the understanding that petitioner had 30 days to accept the prosecutor's offer by performing two conditions: (1) participate in a controlled narcotics buy, and (2) appear before the grand jury. The district court properly found that before the government revoked its offer petitioner had done nothing to perform these two conditions and had not acted to his detriment in reliance upon the offer. Hence, the record clearly shows that, contrary to petitioner's allegations, he had neither manifested his acceptance of the offer nor detrimentally relied on it. The district court's findings, which were affirmed by the court of appeals, are thus well supported in the record and do not warrant further review by this Court.

Furthermore, where, as here, the defendant does not act in reliance upon a prosecutor's plea offer and does not otherwise suffer substantial and irreparable harm, the prosecutor is free to withdraw his plea offer. See, *e.g.*, *United States* v. *Ocanas*, 628 F. 2d 353, 357-358 (5th Cir. 1980), petition for cert. pending, No. 80-1308 (filed Jan. 16, 1981); *Roe* v. *United States Attorney*, 618 F. 2d 980, 982 (2d Cir. 1980); *Government of the Virgin Islands* v. *Scotland*, 614 F. 2d 360, 363-365 (3d Cir. 1980); *State* v. *Edwards*, 279 N.W. 2d 9, 11 (Iowa 1979); *State ex rel. Gray* v. *McClure*, 242 S.E.2d 704, 707 (W.Va. 1978); *Shields* v. *State*, 374 A.2d 816, 818-820 (Del.), cert. denied, 434 U.S. 893 (1977); *People* v. *Heiler*, 79 Mich. App. 714, 262 N.W. 2d 890 (1977); *Wynn* v. *State*, 22 Md. App. 165, 172, 322 A.2d 564, 568 (1974); Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 525 n.189 (1978). Here, moreover, the prosecutor's decision to withdraw the plea offer was motivated by a change in circumstances (newly discovered evidence) and petitioner's failure to cooperate in good faith. Accordingly, petitioner is plainly not entitled to specific performance of the plea offer.

Petitioner's reliance (Pet. 7) on *Santobello* v. *New York*, 404 U.S. 257 (1971), is misplaced. In that case, the defendant pleaded guilty on the condition that the prosecutor would make no recommendation as to his sentence. At sentencing, however, a new prosecutor recommended that the court impose the maximum sentence. This Court held that the State had violated the defendant's rights, because the Due Process Clause requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. Here, in contrast, petitioner never accepted or relied upon the plea offer in question, much less actually entered a plea of guilty based on a specific plea agreement. Nothing in the *Santobello* decision suggests that a defendant is entitled to specific performance of such an unaccepted and unconsummated plea offer.

Likewise, petitioner erroneously argues (Pet. 7-8) that the decision below is in conflict with the Fourth Circuit's decision in *Cooper* v. *United States*, 594 F. 2d 12 (1979). In *Cooper*, the Assistant United States Attorney proposed a plea agreement and stated that the offer would remain open for one week. The defendant's counsel immediately informed the defendant of the offer, and the defendant unequivocally agreed to accept it. The same afternoon the defendant's counsel called the AUSA to inform him of the defendant's agreement to the terms of the offer. In the interim, however, the AUSA had met with his superiors and had been instructed to withdraw the offer, which he did in the course of the telephone call from the defendant's counsel. The court of appeals held that notwithstanding the absence of "tangible 'detrimental; reliance' by the defendant" (*id.* at 16), the government's conduct violated his rights

under the Due Process Clause and the Sixth Amendment.[4] The court emphasized that its ruling was predicated on certain "crucial" facts, including the unconditional nature of the plea proposal, the defendant's prompt and unequivocal acceptance of the plea terms, and the absence of any "extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended." 594 F. 2d at 19. See also *United States* v. *McIntosh*, 612 F. 2d 835, 837 (4th Cir. 1979) (*Cooper* decision limited to situation where defendant personally accepts an offer before its withdrawal).

Although we believe that the *Cooper* decision is wrong (see, *e.g.*, *Government of the Virgin Islands* v. *Scotland*, *supra*), it does not conflict with the decision of the court of appeals in this case. The plea proposal at issue here was expressly conditioned on two requirements. Petitioner never performed those conditions, expressed his willingness to participate in a controlled sale of narcotics, or otherwise unequivocally accepted the plea proposal. Compare 594 F. 2d at 15, 19 with Pet. App. 4a-5a. In addition, here, unlike in *Cooper*, there are extenuating circumstances warranting the withdrawal of the plea offer: Subsequent to the plea offer, the prosecutor received new information demonstrating that petitioner had made misleading statements at the January 2 plea negotiation session and that a misdemeanor plea would not serve the public interest.

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[4]In the court of appeals' view, the government's conduct could have adversely affected the defendant's confidence in his counsel. Compare *Government of the Virgin Islands* v. *Scotland*, *supra*, 614 F. 2d at 363 ("We do not find that the sixth amendment right to effective counsel is implicated in this unconsummated plea bargain situation"). But even assuming that the government's behavior in *Cooper* somehow trenched upon the defendant's Sixth Amendment right to counsel, here petitioner was present during the plea negotiations and thus could not have drawn any adverse inferences about the reliability of his counsel from the government's withdrawal of the plea offer.

2. Petitioner also contends (Pet. 5, 8-9) that the district court's decision is erroneously predicated on its improper *in camera* review of certain documents. These documents were notes taken by AUSA Krakoff and D.C. Detective Centrella of their post-January 2 conversations with other law enforcement officials regarding petitioner's involvement in the drug trade. At the outset, we note that the district court did not refer to these notes in its opinion, which is amply supported in all respects by the consistent testimony of the several government witnesses. Indeed, the district court stated at the December 21, 1979, sentencing proceeding that it could not remember whether it had in fact looked at these notes (Dec. 21, 1979 Tr. 20-22). Moreover, contrary to petitioner's assertion that the court made an *in camera* inspection "[o]ver repeated defense objections" (Pet. 5), the court examined these notes at the *express request* of petitioner.[5] Accordingly, petitioner may not now be heard to complain.

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[5]The district court refused to disclose the written notes to petitioner's attorney on the ground that such disclosure would jeopardize an ongoing criminal investigation (1 Tr. 48, 70-74, 79-80, 88-89, 91-92). The court initially directed that the notes be sealed, stating (*id.* at 89; emphasis supplied):

> *I don't want to see them.* I said you will seal them, file them, put them in the record. *I am not going to look at them.* Seal the notes and put them in the record and if we get reversed for some reason or another and then they want me to look at them then I will call you in and you can interpret your notes.

Thereafter, however, petitioner's attorney stated to the court (*id.* at 103; emphasis supplied):

> The only thing I want to suggest to Your Honor is that I think that for Your Honor to rule in this matter, rather than have these things [the notes] simply sealed for the Court of Appeals, *I would request Your Honor to examine then in camera* so that Your Honor can have some sense of whether or not that type of information and the source from which it came was the sort of thing

In any event, the district court properly undertook to review these notes *in camera* and correctly declined to disclose them to the defendant at his pretrial hearing. These notes reflect privileged details of a then ongoing investigation and do not relate to petitioner's guilt or innocence on the charges in this case. Furthermore, inspection of these notes was not critical to his plea bargain claim; petitioner was fully able to question the various government witnesses about the general susbstance of these notes. In fact, although petitioner had an opportunity following his convictions to cross-examine the DEA agent who was familiar with this investigation and to inspect the notes in question (Dec. 21, 1979 Tr. 5-10, 16-17; Jan. 25, 1980 Tr. 4), [6] petitioner does not claim that any information in those notes contradicted the testimony of the government agents at the pretrial hearing and does not otherwise explain with specificity how these notes might have affected the district court's decision. In these circumstances, the district court's treatment of the privileged notes was not an abuse of discretion. See, *e.g.*, *Kerr* v. *United States*, 426 U.S. 394, 405-406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 706, 714-715 (1974); *McCray* v. *Illinois*, 386 U.S. 300, 305-314 (1967); *Dennis* v. *United States*, 384 U.S. 855, 875 (1966); *Roviaro* v. *United States*, 353 U.S. 53 (1957).

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which could have readily been obtained by a telephone call to these individuals * * *.

The court then stated that it would examine the notes *in camera* unless there were any objections; neither petitioner's attorney nor government counsel objected (*id.* at 112).

[6]The record reflects that petitioner chose not to question the DEA agent. It does not show whether petitioner in fact inspected the notes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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